91-48

Supreme Court, U.S.
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NO. 91-_____

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1991

AFIA/CIGNA WORLDWIDE AND
AMERICAN EXPRESS COMPANY,
*Petitioners*

v.

MARILYN C. FELKNER, DEPUTY COMMISSIONER OF OFFICE OF WORKERS' COMPENSATION PROGRAMS (LHWCA), EIGHTH COMPENSATION DISTRICT, AND WANDA SUE FRAZIER,
*Respondents*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## QUESTIONS PRESENTED FOR REVIEW

I. Did the court of appeals err in resolving the conflicting provisions in the Defense Base Act (DBA) and (LHWCA) by judicially crafting a requirement in DBA cases that appellants must prosecute an administrative appeal under the LHWCA prior to filing the judicial appeal provided in the DBA?

II. What is the proper method to appeal a compensation order issued in a Defense Base Act case?

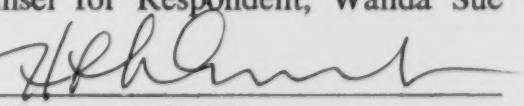
## LIST OF PARTIES

The undersigned, counsel of record, certifies that the following persons and parties have an interest in the outcome of this case:

1. Petitioner, AFIA/CIGNA Worldwide, which is wholly owned by Connecticut General Life Insurance Company. AFIA/CIGNA Worldwide has no subsidiaries.
2. Petitioner, American Express Company, which has no parent company and which wholly owns its subsidiaries.
3. Respondent, Marilyn C. Felkner, Deputy Commissioner of Office of Workers' Compensation Programs (LHWCA).
4. Respondent, Wanda Sue Frazier.
5. Kenneth G. Engerrand, Michael D. Williams, and Brown, Sims, Wise & White, counsel for Petitioners, AFIA/CIGNA Worldwide and American Express.
6. Robert P. Davis, Solicitor of Labor, Carol A. De Deo, Associate Solicitor for Employee Benefits, J. Michael O'Neill, counsel for Longshore, Joshua T. Gillelan and Janet R. Dunlop, Attorneys, United States Department of Labor.

Additional parties below were:

7. Jack Shepherd, Chief Assistant United States Attorney, and Robert Darden, Assistant United States Attorney.
8. Stephen M. Vaughan, Mandell & Wright and Richard P. Hogan, Helm, Pletcher, Hogan, Bowan & Saunders, counsel for Respondent, Wanda Sue Frazier.

By: 

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*Respondents*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, reported at 930 F.2d 1111 (5th Cir. 1991), affirmed the decision of the United States District Court for the Southern District of Texas, which dismissed this case for lack of jurisdiction. The opinion of the court of appeals is printed here as Appendix A.

The district court granted the Deputy Commissioner's motion to dismiss this case for lack of jurisdiction on the basis that the proper appeal of this case was an adminis-

trative appeal to the Benefits Review Board and not a judicial appeal to the district court. The district court's Final Judgment and Order are printed here as Appendix B and Appendix C, respectively.

## JURISDICTION

This petition seeks review of the opinion of the United States Court of Appeals for the Fifth Circuit made and entered on May 10, 1991. Jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). The Petition for Writ of Certiorari is timely filed pursuant to 28 U.S.C. § 2101(c).

## STATUTES PRESENTED FOR REVIEW

This case involves conflicting provisions in two federal statutes, the Defense Base Act, 42 U.S.C. §§ 1651-1654, and the Longshore & Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950. The pertinent provisions of the Defense Base Act are:

> Except as herein modified, the provisions of the Longshoremen's and Harbor Workers' Compensation Act, approved March 4, 1927, as amended, shall apply in respect to the injury or death of any employee engaged in any employment—
>
> > (1) at any military, air, or naval base acquired after January 1, 1940, by the United States from any foreign government . . . .

42 U.S.C. § 1651(a).

> Judicial proceedings provided under sections 18 and 21 of the Longshoremen's and Harbor Workers' Compensation Act in respect to a compensation order made pursuant to this chapter shall be instituted in the United States district court of the judicial district wherein is located the office of the deputy

> commissioner whose compensation order is involved if his office is located in a judicial district, and if not so located, such judicial proceedings shall be instituted in the judicial district nearest the base at which the injury or death occurs.

42 U.S.C. § 1653(b).

The pertinent provisions of the Longshore & Harbor Workers' Compensation Act are:

> A compensation order shall become effective when filed in the office of the deputy commissioner as provided in section 19, and, unless proceedings for the suspension or setting aside of such order are instituted as provided in subdivision (b) of this section, shall become final at the expiration of the thirtieth day thereafter.

33 U.S.C. § 921(a).

> There is hereby established a Benefits Review Board which shall be composed of five members appointed by the Secretary from among individuals who are especially qualified to serve on such Board. The Secretary shall designate one of the members of the Board to serve as chairman. The Chairman shall have the authority, as delegated by the Secretary, to exercise all administrative functions necessary to operate the Board.

33 U.S.C. § 921(b)(1).

> The Board shall be authorized to hear and determine appeals raising a substantial question of law or fact taken by any party in interest from decisions with respect to claims of employees under this Act and the extensions thereof. The Board's orders shall be based upon the hearing record. The findings of

> fact in the decision under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole. . . .

33 U.S.C. § 921(b)(3).

> Any person adversely affected or aggrieved by a final order of the Board may obtain a review of that order in the United States court of appeals for the circuit in which the injury occurred, by filing in such court within sixty days following the issuance of such Board order a written petition praying that the order be modified or set aside. . . .

33 U.S.C. § 921(c).

> Proceedings for suspending, setting aside, or enforcing a compensation order, whether rejecting a claim or making an award, shall not be instituted otherwise than as provided in this section and section 18.

33 U.S.C. § 921(e).

Prior to 1972, the LHWCA provided, in pertinent part:

> If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred (or in the Supreme Court of the District of Columbia if the injury occurred in the District). The orders, writs, and processes of the court in such proceedings may run, be served, and be returnable anywhere in the United States. . . .

33 U.S.C. § 921(b) (1970).

## STATEMENT OF THE CASE

Wanda Sue Frazier injured her coccygix while in the course and scope of her employment for American Express Company at the Rhein-Main Air Force Base, West Germany, on October 12, 1976. AFIA/CIGNA Worldwide is the insurance carrier for American Express Company in connection with Ms. Frazier's claim. The Defense Base Act, 42 U.S.C. §§ 1651-1654 (DBA), provides the compensation remedy for Ms. Frazier against her employer.

Ms. Frazier sought and received benefits under the Longshore & Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (LHWCA), as the Defense Base Act incorporates the LHWCA for its compensation remedy. 42 U.S.C. § 1651(a). A compensation order was filed on July 25, 1989 by Deputy Commissioner Marilyn C. Felkner of the Eighth Compensation District of the United States Department of Labor. In this compensation order the Deputy Commissioner awarded Ms. Frazier temporary total disability benefits from October 13, 1976 through December 2, 1980, and permanent and total disability benefits beginning December 3, 1980 and continuing, subject to adjustment in accordance with Section 10(f) of the LHWCA. 33 U.S.C. § 910(f). The Deputy Commissioner erred in calculating the adjustment pursuant to Section 10(f) of the LHWCA, and AFIA/CIGNA Worldwide and American Express sought to appeal the compensation order.

In view of the conflicting provisions addressing judicial and administrative review in the DBA and LHWCA, AFIA/CIGNA Worldwide and American Express pur-

sued timely appeals of the compensation order by two separate routes. They filed a notice of appeals to the Benefits Review Board, BRB No. 89-2883, on August 24, 1989, pursuant to the provisions of the LHWCA. 33 U.S.C. § 921(b). American Express and AFIA/CIGNA Worldwide also filed their original complaint, No. H-89-2859, in the United States District Court for the Southern District of Texas, Houston Division, invoking the procedure for appeal set out in the Defense Base Act, 42 U.S.C. § 1653(b).

The appeal filed under the provisions of the LHWCA is still pending before the Benefits Review Board. In connection with the appeal filed under the provisions of the DBA, the Deputy Commissioner filed a motion to dismiss the original complaint filed in the United States District Court for the Southern District of Texas. The Deputy Commissioner asserted that the correct means of appeal was to the Benefits Review Board and that the district court lacked jurisdiction over the suit filed by AFIA/CIGNA Worldwide and American Express Company. The district court agreed with the Deputy Commissioner and dismissed this suit, holding that the proper appeal was to the Benefits Review Board and then to the court of appeals, not to a district court.

AFIA/CIGNA Worldwide and American Express challenged the dismissal of the suit filed in federal court pursuant to the provisions of the DBA by filing an appeal with the United States Court of Appeals for the Fifth Circuit. The court of appeals disagreed with the reasoning of the district court but affirmed the district court's judgment that the complaint should be dismissed. The court of appeals held that the district court did not have

initial jurisdiction to review the compensation order but that the district court would have jurisdiction of the case after an administrative appeal to the Benefits Review Board. This petition for a writ of certiorari seeks review of the decision of the court of appeals, affirming the dismissal of the suit brought by AFIA/CIGNA Worldwide and American Express in the federal district court.

## REASONS FOR GRANTING THE WRIT

### 1. Importance Of This Case

This petition is being brought to this Honorable Court because Petitioners do not know the proper means to appeal the erroneous compensation order issued in this case which was brought under the Defense Base Act, 42 U.S.C. §§ 1651-1654 (DBA). Three appellate courts have attempted to resolve the issue, but each decision has yielded a different result. Based on the provisions in the DBA and the cases construing that Statute, there are three different interpretations as to how to appeal a compensation order in a DBA case:

1. File suit initially in federal district court;
2. File an appeal initially with the Benefits Review Board and then file an appeal with the court of appeals; and
3. File an appeal initially with the Benefits Review Board and then file a suit in federal district court.

The issue in this case arises because of the impossible confllict in the provisions of the DBA and the Longshore & Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (LHWCA). The DBA and LHWCA contained similar provisions for appeal of compensation orders

until the LHWCA was amended in 1972. The provisions setting out the process for appeal of compensation orders in the LHWCA were amended in 1972, but the appeal provisions in the DBA were left alone by Congress, either "through legislative oversight or intent." *Home Indemnity Co. v. Stillwell*, 597 F.2d 87, 90 (6th Cir.), *cert. denied*, 444 U.S. 869 (1979). The failure of Congress to amend the DBA caused the provisions in the DBA to come into conflict with the provisions of the LHWCA addressing the method for appeal of compensation orders. Rather than correcting the problem, the appellate courts have exacerbated the situation with utterly conflicting opinions.

The combination of conflicts in the Statutes and appellate decisions has so confused the appellate scheme in DBA cases that Petitioners do not know how to appeal the compensation order entered by the Deputy Commissioner in this case. In fact, this case is only one of two appeals filed by Petitioners in order to insure that they have perfected their appeal of the compensation order in this claim. Moreover, if this Court does not resolve the problem, two more appeals could be necessary in this claim. Petitioners have also brought an appeal to the Benefits Review Board, and the appellate courts disagree as to how to appeal a decision of the Benefits Review Board. Should the appeal be made directly from the Benefits Review Board to the court of appeals; or should the appeal from the Board be filed in the district court? Petitioners appeal to this Honorable Court to resolve the conflicts between the Statutes and the opinions of the lower courts and to provide guidance on the proper means of appealing compensation orders in DBA cases.

The importance of this case does not extend only to DBA cases. The Nonappropriated Fund Instrumentali-

ties Act, 5 U.S.C. §§ 8171-8173, contains a provision for judicial review similar to that contained in the DBA. *Id.* § 8171(d). Thus, the conflicting interpretation given by the lower courts to the provisions of the DBA and LHWCA should apply equally to cases brought under the Nonappropriated Fund Instrumentalities Act.

Finally, the position taken by the court of appeals below, effecting a compromise judicial interpretation of the provisions of LHWCA and DBA, is contrary to that taken by the Solicitor of Labor in the lower courts. The Solicitor argued before both the district court and court of appeals that appeal of compensation orders must be made to the Benefits Review Board and then directly to the court of appeals. (Memorandum in Support of Deputy Commissioner's Motion to Dismiss, p. 8 n.6); (Brief of Marilyn C. Felkner, Deputy Commissioner, p. 12 n.9). The court of appeals held that appeals from the Benefits Review Board must be made first to the district court and then to the court of appeals.

In summary, there is a conflict between the provisions of the governing statutes and in the interpretation of those statutes by the appellate courts. Both the Petitioners and Respondents in this case disagree with the compromise position judicially crafted by the court of appeals below. The conflict extends beyond the Statutes involved in this case, and calls for resolution by this Honorable Court.

**2. Conflict In The Statutes**

Ms. Frazier suffered an injury in the course of her employment for American Express at Rhein-Main Air Force Base in West Germany. Thus, the provisions of the Defense Base Act, 42 U.S.C. § 1651(a), set forth

her remedy—compensation pursuant to the Longshore & Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950. Petitioners (her employer and its insurance carrier) are providing Ms. Frazier with medical and compensation benefits as set out in the LHWCA, but a substantive dispute has arisen as to the calculation of the adjustment to her compensation benefits which must be made pursuant to 33 U.S.C. § 910(f). The Deputy Commissioner entered a compensation order which improperly calculated the adjustments in Ms. Frazier's compensation payments. Petitioners have sought to appeal the erroneous calculation in the order. The question in this case involves the determination of the proper method for appeal of a compensation order in a DBA case.

The Longshore & Harbor Workers' Compensation Act was originally enacted in 1927. Subsequently, the coverage provided by the LHWCA has been extended to employees other than longshore and harbor workers by various acts including the DBA and the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §§ 8171-8173.

When the DBA was enacted in 1941, the Statute provided that the provisions of the LHWCA would apply to injuries or deaths of workers covered under the DBA:

> Except as herein modified, the provisions of the Longshoremen's & Harbor Workers' Compensation Act . . . shall apply in respect to the injury or death of any employee [covered by the DBA].

42 U.S.C. § 1651(a).

At the time the DBA was enacted, the LHWCA provided that judicial proceedings to set aside compensation

orders would be heard in the federal district court where the injury occurred. 33 U.S.C. § 921(b) (1970). The DBA contained a similar but more explicit provision for appeal of compensation orders:

> Judicial proceedings provided under sections 18 and 21 of the Longshoremen's and Harbor Workers' Compensation Act in respect to a compensation order made pursuant to this chapter shall be instituted in the United States district court of the judicial district wherein is located the office of the deputy commissioner whose compensation order is involved if his office is located in a judicial district, and if not so located, such judicial proceedings shall be instituted in the judicial district nearest the base at which the injury or death occurs.

42 U.S.C. § 1653(b). In summary, prior to 1972, the DBA and LHWCA provided a coherent scheme for review of compensation orders—review was initially to be brought in federal district court with appeal from the district court to the court of appeals.

After years of debate, Congress made its first major overhaul of the LWHCA in 1972. The 1972 Amendments to the LHWCA have engendered litigation on virtually every change they made. In fact, the problems caused by the 1972 Amendments led to another major overhaul of that Statute by Congress in 1984. One of the significant changes in the 1972 Amendments involved the administration of claims brought under the LHWCA. Since 1972, the LHWCA has provided that compensation orders are appealed to the Benefits Review Board. 33 U.S.C. § 921(b). From the Benefits Review Board, an appeal is made to the United States court of appeals for the circuit in which the injury occurred. *Id.* § 921(c).

Despite the lengthy debate that led to the enactment of the 1972 Amendments to the LHWCA, Congress wholly failed to address the relationship between the LHWCA and other federal statutes. For example, in the context of its attempt to eliminate the warranty of seaworthiness, which was extended to longshoremen in *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946), Congress provided: "The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred." 33 U.S.C. § 905(b). However, the court below pointed out in *Aparicio v. Swan Lake*, 643 F.2d 1109, 1118 (5th Cir. 1981): "Congress simply did not consider the possibility that maritime workers not covered by the LHWCA qualified for *Sieracki* seaman status under the existing case-law." Thus, in the context of injuries to longshore and harbor workers which are covered under the Federal Employees' Compensation Act, 5 U.SC. § 8101-8151, the worker may continue to bring the *Sieracki* seaworthiness action in existence prior to the 1972 Amendments to the LHWCA.

Likewise, Congress did not consider or amend the provisions of the DBA in 1972 to change the procedure for review of compensation orders in DBA cases to match the new procedures adopted in the LHWCA. The DBA continues to provide for suit to be brought in federal district court to set aside orders of the Deputy Commissioner. Just as there continue to be "pockets of *Sieracki* seamen remaining after the 1972 amendments," *Aparicio*, 643 F.2d at 1118 n. 17, there are "pockets of" LHWCA claims in which the appeal process continues to go through the federal district courts.

The conflict between the DBA and LHWCA arises because the DBA continues to require that judicial proceedings to review compensation orders (provided for in Section 21 of the LHWCA) *shall* be instituted in the district court. However, Section 21 of the LHWCA no longer provides for review of compensation orders in LHWCA claims in the district courts. Moreover, the amended provisions in Section 21 of the LHWCA, setting forth the review process of compensation orders, provide for appellate review by the "court of appeals for the circuit in which the injury occurred." 33 U.S.C. § 921(c). As DBA cases normally occur on foreign military bases, the LHWCA provisions provide *no* circuit in which judicial review of compensation orders may be obtained in DBA cases.

In summary, interpreting the DBA and LHWCA together provides no clear answer to the dilemma in this case—where to pursue review of a compensation order in a DBA case. The DBA continues to provide that judicial review of compensation orders, as set forth in the LHWCA, shall be in the district court where the deputy commissioner's office is located. The amendments to the LHWCA have eliminated district court review of compensation orders and have substituted judicial review in a circuit court which has no jurisdiction. Thus, judicial intervention is necessary to address the relationship between the DBA and LHWCA and to determine the proper steps in the appellate process for reviewing compensation orders issued in DBA cases.

### 3. Conflict In The Decisions of the Lower Courts

Three appellate courts have addressed the relationship between the DBA and the LHWCA. These courts have

arrived at conflicting results. One circuit court followed the "unambiguous" language of Congress and arrived at the conclusion that the LHWCA review provisions do not apply in a DBA case. *Home Indemnity Co. v. Stillwell,* 597 F.2d 87, 89 (6th Cir.), *cert. denied,* 444 U.S. 869 (1979). The Sixth Circuit stated:

> First, § 921(c) is the judicial review provision of the Longshoremen's Act and it is not applicable to the present claim brought under the auspices of the Defense Base Act. 42 U.S.C. § 1653(b) governs judicial review of Defense Base Act claims. Further, from a reading of the statute it becomes clear that § 921(c) is inapplicable to the case at bar.

*Id.* at 90. After determining that the LHWCA review provision does not apply in a DBA case, the court concluded that the proper method to obtain review of a compensation order is in the district court: "Under the current statutory scheme the compensation order in the present case is reviewable in the appropriate United States district court pursuant to 42 U.S.C. § 1653(b)." 597 F.2d at 90.

The Court of Appeals for the Ninth Circuit came to the opposite conclusion in *Pearce v. Director, OWCP,* 603 F.2d 763 (9th Cir. 1979). That court did not believe that the DBA provision confers jurisdiction on the United States district courts. *Id.* at 770. Disagreeing with the Sixth Circuit, the Ninth Circuit held that the 1972 Amendments to the LHWCA, eliminating jurisdiction of the district courts in LHWCA claims, are also operative in DBA claims to repeal the language which Congress left in the DBA, 42 U.S.C. § 1653(b). *Pearce,* 603

F.2d at 770. Thus, the Ninth Circuit held that the appellate process set forth in the LHWCA is applicable in DBA claims. The provision in the LHWCA requiring that appeals be brought in the circuit in which the injury occurred had to be modified, however, or no appellate court would have jurisdiction over appeals from the Benefits Review Board. Thus, the Ninth Circuit judicially amended the DBA and LHWCA to provide that the appropriate appellate court to hear appeals in DBA cases is the court in the circuit in which the Deputy Commissioner's office is located. *Id.*

The approach taken by the Fifth Circuit in the case at bar effected a compromise between the Statutes. In effect, while denying any intent "to correct Congressional oversight" *AFIA/CIGNA Worldwide v. Felkner,* 930 F.2d 1111, 1116-17 (5th Cir. 1991), the court enacted a modified version of each Statute. The court adopted the first half of the LHWCA appellate scheme (administrative review in the Benefits Review Board pursuant to 33 U.S.C. § 921(b)), but then the court substituted the judicial review provisions of the DBA, 42 U.S.C. § 1653 (b), for the direct judicial appeal to the court of appeals which is prescribed in the LHWCA (33 U.S.C. § 921(c)). Thus, applying the decision of the Fifth Circuit, a party in a DBA case must first appeal a compensation order through the Benefits Review Board, then to the United States district court, and then to the court of appeals. The Fifth Circuit rejected the approach taken by the Ninth Circuit in *Pearce* and held that the DBA appellate process must be combined with the LHWCA appellate process.

### 4. Effect of Conflicts in the Statutes and Appellate Decisions

The provisions of the DBA and LHWCA, construed together, provide no clear answer to the issue of how to appeal compensation orders in DBA cases:

DBA: Provides that judicial review of compensation orders, as provided in the LHWCA, shall be in the federal district court where the Deputy Commissioner's office is located. The LHWCA, however, no longer provides for review in the district courts.

LHWCA: Provides for review of compensation orders by the Benefits Review Board and then by the court of appeals for the circuit in which the injury occurred. As DBA cases arise on foreign military bases, the use of the LHWCA appellate process provides for no circuit court in which to pursue an appeal from the Benefits Review Board.

The appellate courts have attempted to resolve the conflicting statutory provisions, but have exacerbated the problem by adopting conflicting interpretations of the Statutes:

1. "Under the current statutory scheme the compensation order in the present case is reviewable in the appropriate United States district court pursuant to 42 U.S.C. § 1653(b)." *Home Indemnity Co. v. Stillwell,* 597 F.2d 87, 90 (6th Cir.), *cert. denied,* 444 U.S. 869 (1979).

2. ". . . the Defense Base Act does not confer jurisdiction on the district court . . . ." *Pearce v. Director, OWCP,* 603 F.2d 763, 770 (9th Cir. 1979).

3. "Therefore, in DBA cases, initial review of a compensation order is administrative to the BRB, and the BRB's decision is judicially reviewed by appeal to the appropriate district court." *AFIA/CIGNA Worldwide v. Felkner,* 930 F.2d, 1111, 1114 (5th Cir. 1991).

The effect of the judicial interpretation of the DBA and LHWCA renders the relationship between the Statutes even more confusing. Making matters worse, however, is the effect of the decision of the court of appeals below, in which appeals are first directed to the Benefits Review Board and then to the federal district court. The Fifth Circuit does not address what standard the district court should use to review the opinion of the Benefits Review Board.

Petitioners filed two appeals from the compensation order issued in this case in order to perfect their appeal. If this Court does not resolve the conflicting appellate decisions, two more appeals would have to be filed to review the decision of the Benefits Review Board in this case. According to the Fifth Circuit, the judgment of the Board would be reviewed by suit filed in federal district court. According to the Ninth Circuit, a direct appeal to the Fifth Circuit would be appropriate.

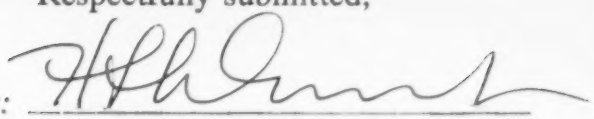
## CONCLUSION

It was improper for the Ninth Circuit and Fifth Circuit to correct what they perceive to be an oversight of Congress when it amended the LHWCA in 1972. The appellate courts should not redraft the DBA to enact their view of what Congress may have intended but failed to do. Prior to 1972, compensation orders in DBA cases were appealed directly to the federal district court pur-

suant to 42 U.S.C. § 1653(b). Congress made no change in the DBA in 1972 or subsequently. Petitioners brought this action in federal district court under the provisions of the DBA *stating that appeals of compensation orders shall be instituted* in the federal district court. The district court and the court of appeals rejected this approach and instead crafted an amendment to the DBA that Congress failed to provide in 1972.

A decision of this Court interpreting the DBA and LHWCA is essential so that the conflict between the Statutes and decisions of the appellate courts can be resolved and so that the parties to DBA cases will know how to appeal compensation orders. Petitioners respectfully request that this Honorable Court grant Petitioners' writ of certiorari, set forth the appeal steps for compensation orders in DBA cases and reverse the decision of the Fifth Circuit which denies jurisdiction of the district court.

Respectfully submitted,

By: 

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# APPENDIX A

AFIA/CIGNA WORLDWIDE, and American Express Co., Plaintiffs-Appellants,

v.

Marilyn C. FELKNER, Deputy Commissioner, Office of Workers' Compensation Programs, and Wanda Sue Frazier, Defendants-Appellees.

No. 90-2339.

United States Court of Appeals, Fifth Circuit.

May 10, 1991.

Employer of injured worker moved to set aside award of compensation made pursuant to Defense Base Act. The United States District Court for the Southern District of Texas, David Hittner, J., dismissed suit for lack of subject matter jurisdiction, and appeal was taken. The Court of Appeals, Wiener, Circuit Judge, held that initial appeal of compensation order was to Benefits Review Board as administrative appeal under Longshore and Harbor Workers' Compensation Act.

Affirmed.

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Appeal from the United States District Court for the Southern District of Texas.

Before GOLDBERG, JOLLY and WIENER, Circuit Judges.

WIENER, Circuit Judge:

Plaintiffs-Appellants, American Express Company and its insurer, AFIA/CIGNA Worldwide, (collectively, AFIA/CIGNA), appeal the district court's dismissal of their suit to set aside an award of compensation made by Deputy Commissioner, Marilyn C. Felkner to claimant, Wanda Sue Frazier, Defendants-Appellees, for lack of subject matter jurisdiction under section 21(b) of the Longshoremen and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950, as incorporated in the Defense Base Act, 42 U.S.C. §§ 1651-1654. Finding that dismissal of the suit was proper, we affirm.

## FACTS AND PROCEEDINGS BELOW

Frazier was employed by the American Express Company when she suffered an injury in the course of her employment at the Rhein-Main Air Force Base in West Germany. This injury caused temporary total disability from October 13, 1976, to December 3, 1980, and permanent total disability thereafter.

Frazier filed for workers' compensation under the Longshoremen and Harbor Workers' Compensation Act (LHWCA) as incorporated by the Defense Base Act (DBA). In July 1989, a compensation order was filed by Deputy Commissioner Felkner of the Eighth Compensation District of the United States Department of Labor awarding compensation to Frazier.

Purporting to comply with section 3(b) of the DBA, AFIA/CIGNA sought judicial review of the deputy commissioner's order by filing suit in the United States District Court for the Southern District of Texas[1] to set aside

1. Felkner's office is located within the geopraphical limits of the United States district court for the Southern District of Texas.

the compensation order. As a precaution, they also sought administrative review by appealing the compensation order to the Benefits Review Board (BRB) under section 21(b) of the LHWCA. Deputy Commissioner Felkner filed a motion to dismiss the district court suit on the ground that the district court lacked subject matter jurisdiction under section 3 of the DBA, insisting that exclusive jurisdiction for the initial appeal of the compensation order was with the Benefits Review Board. The district court agreed and granted the motion, dismissing the case for lack of subject matter jurisdiction.

AFIA/CIGNA timely appealed. To the best of our knowledge, AFIA/CIGNA's administrative appeal to the BRB has not yet been resolved.

*The Interplay Between the DBA and LHWCA*

[1] The DBA provides workers' compensation coverage for employees of American contractors engaged in construction related to military bases in foreign countries, and to foreign projects related to the national defense whether or not the project is located on a military base. *See* § 1, 55 Stat. 622, 42 U.S.C. § 1651; *University of Rochester v. Hartman,* 618 F.2d 170, 172, 173 n.1 (2d Cir. 1980), Section 1 of the DBA provides:

> Except as herein modified, the provisions of the Longshoremen['s] . . . Act, approved March 4, 1927 (44 Stat. 1424), as amended, shall apply in respect to the injury or death of any employee [covered by the Defense Base Act . . .]

42 U.S.C. § 1651(a) (1982); *Pearce v. Director, Office of Workers' Compensation Programs,* 603 F.2d 763, 765

(9th Cir. 1979). Therefore, the compensation protocol provided by the LHWCA governs a claim under the DBA except to the extent the DBA specifically modifies a provision of the LHWCA. *See Pearce,* 603 F.2d at 766. If the DBA provides a specific modification then the provisions of the DBA control, *Home Indemnity Co. v. Stillwell,* 597 F.2d 87, 88-89 (6th Cir.), *cert. denied,* 444 U.S. 869, 100 S. Ct. 145, 62 L.Ed.2d 94 (1979).

[2] Before the LHWCA was amended in 1972, section 19 of the LHWCA provided for the deputy commissioner initially to investigate and decide all claims for compensation.[2] In 1972, section 19 of the LHWCA was amended to transfer the deputy commissioner's hearing authority to an administrative law judge. *See* 33 U.S.C. § 919(c) & (d) (1982). That amendment bifurcated the various powers previously vested in the deputy commissioner, reserving the investigative and enforcement responsibilities to the deputy commissioners but transferring the adjudicative functions to administrative law judges. S.Rep. No. 92-1125, 92 Cong., 2d Sess. 13-14 (1972). Because the DBA contains no special provisions modifying the procedures set forth in LHWCA section 19, that section applies to DBA claims through section 1651(a)'s general incorporation provision.[3] Therefore, the procedures ap-

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2. Section 19 of the LHWCA provides the procedure with respect to claims for compensation including the procedures for filing a claim for compensation, time limits, the duties of the deputy commissioner in determining an award, the procedures the deputy commissioner must follow to investigate a claim, and the procedures he must follow to conduct a hearing on an award or on the rejection of a claim. 33 U.S.C. § 919(a)-(h).

3. The DBA is a general reference statute that incorporates not only the version of the LHWCA in force at the time the DBA was enacted, but all subsequent LHWCA amendments as well. *See Pearce,* 603 F.2d at 767; *Director, Office of Worker's Compensation Pro-*

plicable to file a claim under the DBA and to obtain an initial determination of the claim are the very procedures set forth in the LHWCA for a claim arising under that Act.[4]

Before 1972, appeal of a deputy commissioner's decision under both the LHWCA and DBA was judicial only. Under LHWCA section 21(b) judicial review was

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*grams v. Peabody Coal Co.*, 554 F.2d 310, 322 (7th Cir. 1977) ("When a statute adopts the general law on a given subject, the reference is construed to mean that the law is as it reads thereafter at any given time including amendments subsequent to the time of adoption.").

AFIA/CIGNA argues that Congress specifically deleted language from the DBA that provided that the DBA incorporated the LHWCA as amended, *"and as the same may be amended in hereafter,"* 55 Stat. 622, so that the clear implication is that Congress did not intend the DBA to incorporate subsequent amendments to the LHWCA. We disagree, finding that the intent behind this deletion is at best ambigious. Whatever may have been Congress's unspoken intent, we find no indication in the legislative history of the DBA that Congress intended to restrict the DBA's application to the version of the LHWCA in force at the time the DBA was enacted.

The DBA itself contains no substantive provisions: the entirety of the Act contains some procedural and definitional provisions specifically tailored to DBA claimants, but contains no provisions dealing with the substance of a claim under the DBA. All of the DBA's "substantive" provisions, and most of its procedural provisions, are found in the LHWCA. It is unavailing to argue, as does AFIA/CIGNA, that when Congress amended the "substance" of the DBA—the LHWCA—it intended to preclude those changes from ever applying to claims arising under the DBA.

Therefore, after reviewing the plain wording of the statutes and the legislative history of the DBA, we find that the 1972 amendments to the LHWCA (as well as all other amendments) apply to claims arising under the DBA unless such amendments are inconsistant with the administration of claims under the DBA or conflict with one of the express modifying provisions set forth in the DBA.

4. One significant difference between the filing procedure of the DBA and that of the LHWCA concerns where to file the claim. The DBA specifically modifies section 19(a) of the LHWCA by providing different compensation districts for filing claims arising under the DBA. *See* 42 U.S.C. § 1653(a).

by injunction proceedings "in the federal district court for the judicial district in which the injury occurred." Pub. L. No. 92-576, 86 Stat. 1251, 33 U.S.C. § 921(b) (1970) (amended 1972). Because the DBA by definition applied to overseas sites, the injury or death in most if not all such cases could not possibly occur within any federal judicial district. *See Pearce,* 603 F.2d at 766. Therefore, Congress specifically modified the judicial review provisions under section 21(b) of the LHWCA by enacting section 3(b) of the DBA which states:

> *Judicial proceedings* provided under sections 18 and 21 of the Longshoremen['s] . . . Act in respect to a compensation order made pursuant to [the Defense Base Act] shall be instituted in the United States District Court of the judicial district wherein is located the office of the deputy commissioner whose compensation order is involved if his office is located in a judicial district, and if not . . . [the proceeding] shall be instituted in the judicial district nearest the base at which the injury or death occurs.

42 U.S.C. § 1653(b)(emphasis added).

Under the 1972 amendments to the LHWCA, section 21's procedures, calling for initial review of a compensation order to be judicial was discarded in favor of the initial review being administrative, by the BRB, a specialized three-member board. *See* Amendments § 15(a), 86 Stat. 1261, amending Longshoremen's Act § 21(b) & (c) (1988). The 1972 amendments to the LHWCA also amended the provisions governing judicial review of compensation orders, making a final decision of the BRB reviewable not in federal district court but in the federal court of appeals for the circuit in which the injury oc-

curred. *See* § 21(c) LHWCA, 33 U.S.C. § 921(c) (1982). Significant to our consideration, section 3 of the Defense Base Act, which provides for judicial review of final compensation orders in the federal district court, was not concurrently amended.

## ANALYSIS

[3] The core issue on appeal is whether the 1972 Amendments to section 21 of the LHWCA, providing for initial review of compensation orders to be administrative with the BRB, apply to initial review of compensation orders under the DBA. After parsing the statutory language and analyzing the interrelationship of the LHWCA and the DBA, we conclude that the initial appeal of a compensation order issued pursuant to a claim under the DBA is to the Benefits Review Board as an *administrative* appeal under section 21(b) of the LHWCA, just as is the initial review of an order issued pursuant to a claim originating under the LHWCA. But following administrative review by the BRB, the judicial review provisions under these two statutory schemes diverge: following BRB review of a claim brought pursuant to the LHWCA, judicial review begins in the cognizant United States court of appeals; but, as unambiguously provided in section 3(b) of the DBA, judicial review of compensation orders under the DBA begins in the United States district court for the judicial district wherein is located the office of the deputy commissioner whose compensation order is to be reviewed. Therefore, in DBA cases, initial review of a compensation order is administrative to the BRB, and the BRB's decision is judicially reviewed by appeal to the appropriate district court.

A.

*Initial Appeal to the BRB*

AFIA/CIGNA argues that the 1972 amendments to section 21 of the LHWCA do not apply to the DBA because the review provisions of the LHWCA are inconsistent with the specific modifying provisions in section 3(b) of the DBA. AFIA/CIGNA contends that, under the plain wording of section 1653(b), review of compensation orders is in "the United States district court of the judicial district wherein is located the office of the deputy commissioner whose compensation order is involved. . . ." 42 U.S.C. § 1653(b). Therefore, concludes AFIA/CIGNA, review of a compensation order by the BRB is inconsistent with the plain language of a specific modifying provision of the DBA.

But AFIA/CIGNA misreads this provision, neglecting to recognize that the first word in section 1653(b)—"judicial"—modifies "proceedings," an observation that is crucial to proper construction of the DBA. Section 1653(b) of the DBA states in part:

> *Judicial proceedings* provided under sections 18[33 U.S.C. § 918] and 21 [33 U.S.C. § 921] of the Longshoremen['s] . . . Act in respect to a compensation order made pursuant to [the Defense Base Act] shall be instituted in the United States District Court of the judicial district wherein is located the office of the deputy commissioner whose compensation order is involved. . . .

42 U.S.C. § 1653(b) (emphasis added). Section 1653(b) addresses and modifies only the *judicial* proceedings provided in sections 18 and 21 of the LHWCA. Review of

compensation orders by the BRB is an *administrative* proceeding, not a judicial one. No provision of the DBA addresses *administrative* review of a compensation order by the BRB; thus, because the DBA contains no specific modifications of the LHWCA's post-1972 provision for *administrative* review, section 21(b) of the LHWCA, as amended,[5] applies to claims under the DBA.

Furthermore, requiring the BRB to review DBA compensation orders does not create any inconsistencies in, or disrupt, the administration of DBA claims. First, that requirement retains parallelism between the DBA and the LHWCA, at least for the first step of the appellate review process. Second, review by the BRB does not interfere with any of the judicial review provisions already in place under the DBA; it merely inserts another level of review for compensation orders issued pursuant to that Act.

When Congress amended the LHWCA in 1972, it did not specifically modify the DBA to proscribe review of compensation orders by the BRB. Because the DBA does not specifically modify LHWCA section 21(b)'s provision for BRB review, and because review by the BRB does not conflict with the administration of claims under the DBA, we hold that the 1972 amendments to the LHWCA which provide for *administrative* review of compensation orders by the BRB apply to claims arising under he DBA. The district court, therefore, did not err in dismissing AFIA/CIGNA's suit for judicial review of Felkner's compensation award to Frazier before that claim had been reviewed administratively by the BRB.

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5. *See supra* note 3.

B.

*Appeal of BRB Final Decisions*

In the instant case, the district court stated its agreement with the Ninth Circuit's position in *Pearce* that, under section 921 of the LHWCA, the proper court to hear an appeal of a BRB decision reviewing a DBA claim would be the court of appeals rather than the district court. We disagree,[6] finding that in this case, the district court failed to follow the review portocol laid out by the plain language of section 3 of the DBA, and therefore erred in determining that judicial review of BRB decisions dealing with claims arising under the DBA would skip the district court and proceed directly to the appropriate court of appeals, as do appeals from the BRB's review of claims originating under the LHWCA.

True, section 21(c) of the LHWCA provides in part that

> Any person adversely affected or aggrieved by a final order of the Board may obtain a review of that order in the United States court of appeals for the circuit in which the injury occurred . . .

33 U.S.C. § 921(c). It is likewise true that this section provides for *judicial review* of a compensation order, pursuant to the LHWCA, by the BRB. But as we noted previously, section 3 of the DBA modifies only the provisions for *judicial* proceedings found in section 21 of the LHWCA. Therefore, it is at the judicial review

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6. In disagreeing with the Ninth Circuit on this issue, we do not create a conflict between the circuits. The Sixth Circuit in *Home Indemnity* has already adopted a position in direct conflict with the one advanced by the Ninth Circuit in *Pearce*. We merely agree with the Sixth Circuit's reading of section 3(b) of the DBA.

stage that the DBA, by its express terms, specifically deviates from the review protocol provided by the LHWCA. Thus, we look to the provisions of the DBA to determine the proper court for judicial review. *See, e.g., Home Indemnity,* 597 F.2d at 89 (if a provision of the DBA specifically modifies provision of LHWCA, that DBA provision controls).

Section 1653 is unambiguous in requiring that *any* judicial proceeding initiated to review a compensation order made pursuant to the DBA be conducted in the United States district court of the judicial district wherein the office of the deputy commissioner who issued the initial order is located. *See Home Indemnity,* 597 F.2d at 89. As the language of the DBA is free from ambiguity, jurisprudential modification of its plain statutory language would amount to judicial legislation. *See Maine v. Thiboutot,* 448 U.S. 1, 4, 100 S. Ct. 2502, 2504, 65 L.Ed.2d 555 (1980); *Rawlins v. National Transp. Safety Board,* 837 F.2d 1327, 1329 (5th Cir. 1988).

As noted above, Congress did not amend the *judicial* review provisions of the DBA when it amended the LHWCA in 1972, leaving the language of section 3(b) of the DBA intact. Absent express legislative intent to the contrary, we are bound to interpret any unambiguous provision of the DBA according to its clear wording. *See Alabama v. Marshall,* 626 F.2d 366, 368-69 (5th Cir. 1980), *cert. denied,* 452 U.S. 905, 101 S. Ct. 3029, 69 L.Ed.2d 405 (1981). Under the plain, unambiguous language of section 3 of the DBA, *judicial* review of a compensation order dealing with a claim arising under the DBA is to be initiated in the United States district court for the judicial district in which the office of the

deputy commissioner whose compensation order is involved is located; or, if the deputy commissioner's office is not located in a judicial district, then in the United States district court for the judicial district closest to the site where the injury occurred. *See* 42 U.S.C. § 1653(b). Clearly, judicial review of a BRB decision in a DBA case is to be initiated in the district court rather than in the court of appeals.[7] Thereafter, a party dissatisfied with the results in the district court has an additional appeal of right to the United States court of appeals for the circuit wherein lies the district court from which the appeal is taken. *See* 28 U.S.C. § 1294; *Pearce*, 603 F.2d at 766.

## CONCLUSION

Under the current statutory scheme, compensation orders for claims arising under either the DBA or the LHWCA are first reviewed by the BRB. After that, further judicial reviews follow divergent paths depending on whether the claim originated under the DBA or the LHWCA. BRB determinations on claims originating under the LHWCA are appealed to the United States court of appeals for the circuit in which the claimant's injury oc-

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7. We note that if in DBA cases, we were to follow LHWCA § 21(c)'s directive that BRB decisions are appealed to the court of appeals for the circuit in which injury occurred, we would essentially foreclose appellate review of BRB decisions because in all cases arising under the DBA, injury or death of the employee occurs outside the continental U.S. Therefore, under 921(c)'s scheme, no circuit court would have jurisdiction to hear the appeal. Thus, applying section 921(c)'s judicial review procedure would be inconsistent with the administration of claims under the DBA. Although we could follow *Pearce* to get around this conflict, *see Pearce*, 603 F.2d at 770, we decline to cross the line between interpretation and legislation as we perceive it, given the plain wording of the subject statutes.

curred as provided in section 21(c) of the LHWCA, 33 U.S.C. § 921(c). On the other hand, BRB determinations on claims originating under the DBA are appealed to the United States district court for the district in which the deputy commissioner's office is located as provided in section 3(b) of the DBA, 42 U.S.C. § 1653(b). Appeal of a district court's decision regarding the BRB's review of a DBA claim lies with the court of appeals for the circuit in which that district court sits.

We refrain from speculating whether Congress made a conscious decision to send DBA compensation orders first to the BRB, then to the district court and finally to the court of appeals, or whether such result was inadvertent. We are satisfied that, when the DBA and the LHWCA are read *in pari materia*, that is precisely the administrative and judicial review route spelled out in the plain wording of those statutes.

While we recognize that taking this rather attenuated avenue to review DBA compensation orders may be cumbersome and duplicative, it is not our function to correct Congressional oversight, particularly when such oversight does not lead to impossible or absurb results. It is for Congress to eliminate any redundant steps insinuated by the 1972 amendments to the LHWCA. Until Congress so acts, we are bound to interpret the DBA according to its plain, unambiguous language.

For the foregoing reasons, the judgment of the district court is AFFIRMED.

## APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-89-2859

AFIA/CIGNA WORLDWIDE and
AMERICAN EXPRESS COMPANY,
Plaintiffs,

v.

MARILYN C. FELKNER, Deputy Commissioner,
Office of Workers' Compensation Programs,
and WANDA SUE FRAZIER,
Defendants

Filed February 2, 1990

FINAL JUDGMENT

As the motion to dismiss (Document #4) of defendant Marilyn C. Felkner ("Felkner"), Deputy Commissioner of the Office of Workers' Compensation Programs, has been granted, this Court

DISMISSES this cause of action pursuant to Fed. R. Civ. P. 12(b)(1), 12(b)(6).

This is a FINAL JUDGMENT.

SIGNED at Houston, Texas, on this the 31 day of January, 1990.

/s/ DAVID HITTNER
David Hittner
United States District Judge

## APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-89-2859

AFIA/CIGNA WORLDWIDE and
AMERICAN EXPRESS COMPANY,
Plaintiffs,

v.

MARILYN C. FELKNER, Deputy Commissioner,
Office of Workers' Compensation Programs,
and WANDA SUE FRAZIER,
Defendants.

Filed February 2, 1990

ORDER

Pending before this Court is a motion to dismiss (Document #4) filed by defendant Marilyn C. Felkner ("Felkner"), Deputy Commissioner of the Office of Workers' Compensation Programs.

The plaintiffs seek through this action to obtain this Court's review of a disability ruling and award of benefits by Felkner regarding defendant Wanda Sue Frazier ("Frazier"). Frazier's claim for disability compensation came under the Defense Base Act, 42 U.S.C. §§ 1651-1654 (1982), which incorporates the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (1982 & Supp. IV 1986). In challenging Felkner's award, the plaintiffs filed an administrative appeal with the Benefits Review Board ("BRB") pursuant to 33 U.S.C.

§ 921 (1982 & Supp. IV 1986). Apparently contemporaneously, the plaintiffs filed this action. Felkner now seeks dismissal of this action in a motion to which the plaintiffs have not responded.

This Court does not have jurisdiction of this appeal pending the resolution of the plaintiffs' appeal before the BRB. *See* 33 U.S.C. § 921(c); *Pearce v. Director, Office of Workers' Compensation Programs,* 603 F.2d 769-71 (9th Cir. 1979). Furthermore, the proper court for an appeal from any decision of the BRB would appear to be a court of appeals, not a district court. *See* 33 U.S.C. § 921(c); *Pearce,* 603 F.2d at 770.

Based on the foregoing, the Court

ORDERS that this action is hereby DISMISSED with prejudice pursuant to Fed. R. Civ. P. 12(b)(1), 12 (b)(6).

SIGNED at Houston, Texas, on this the 31 day of January, 1990.

/s/ DAVID HITTNER
David Hittner
United States District Judge

Supreme Court, U.S.
FILED
SEP 13 1991
OFFICE OF THE CLERK

No. 91-48

# In the Supreme Court of the United States

OCTOBER TERM, 1991

AFIA/CIGNA WORLDWIDE, ET AL., PETITIONERS

*v.*

MARILYN C. FELKNER, ETC., ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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## QUESTION PRESENTED

Whether Section 21(b) of the Longshore and Harbor Workers' Compensation Act, providing for administrative review by the Benefits Review Board of workers' compensation decisions, applies to claims arising under the Defense Base Act.

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# In the Supreme Court of the United States

OCTOBER TERM, 1991

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No. 91-48

AFIA/CIGNA WORLDWIDE, ET AL., PETITIONERS

*v.*

MARILYN C. FELKNER, ETC., ET AL.

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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## BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals, Pet. App. A1-A13, is reported at 930 F.2d 1111. The order of the district court, Pet. App. C1-C2, is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on May 10, 1991. The petition for a writ of certiorari was filed on July 5, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. The present dispute concerns the extent to which the Defense Base Act (DBA), 42 U.S.C. 1651-1654, incorporates the amended appellate review procedures of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.* Congress enacted the DBA in 1941 to provide workers' compensation coverage for employees of government contractors at overseas military bases, and shortly thereafter broadened coverage to all employees of American contractors engaged in foreign projects related to the national defense, regardless of whether they were employed on military bases. See generally *University of Rochester* v. *Hartman*, 618 F.2d 170, 172, 173 & n.1 (2d Cir. 1980).[1] Rather than drafting a new workers' compensation scheme, Congress generally extended the already established LHWCA provisions to the newly covered workers. Accordingly, Section 1(a) of the DBA provides that the provisions of the LHWCA shall apply to DBA-covered workers "[e]xcept as * * * modified" by the DBA itself. 42 U.S.C. 1651(a).

The DBA thus incorporates the claim-processing procedures of the LHWCA with only minor modifications. Before its amendment in 1972, Section 19 of the LHWCA authorized deputy commissioners in the Department of Labor's Office of Workers' Compensation Programs (OWCP) to investigate claims for benefits under the Act, to hold formal evidentiary

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[1] In addition, Congress eventually expanded DBA coverage to protect employees fulfilling service contracts tied to an overseas governmental construction project or to a national defense activity. *University of Rochester*, 618 F.2d at 173 & n.1. The coverage provisions of the Act are set forth at Section 1(a)(1)-(6), 42 U.S.C. 1651(a)(1)-(6).

hearings where necessary, and to issue decisions on the claims. 33 U.S.C. 919 (1970); Pet. App. A4. Under Section 21 of the pre-1972 LHWCA, any party seeking review of a compensation order issued by the deputy commissioner could do so by filing an injunction action in the federal district court for the judicial district in which the employee's injury occurred. 33 U.S.C. 921(b) (1970); Pet. App. A6.

The sole modification to the LHWCA procedures is found in Section 3(b) of the DBA, 42 U.S.C. 1653(b), pertaining to judicial review of compensation orders. At the time of the DBA's enactment, the LHWCA provided for judicial review in the judicial district where the injury occurred. Since claims under the DBA typically arise outside of a judicial district of the United States, Pet. App. A6, Congress specified in Section 3(b) of the DBA that "[j]udicial proceedings provided under section[] * * * 21 of the [LHWCA]" should be instituted in the district court of the judicial district where the office of the deputy commissioner whose compensation order is involved is located.[2]

In 1972, Congress amended the Longshore Act by, among other things, making major revisions in the

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[2] Section 3(b) also provides, alternatively, that if the office of the deputy commissioner who issued the compensation order is not located in a judicial district, judicial review proceedings should be brought in the district court in the judicial district closest to the place of injury. This provision is consistent with Section 3(a) of the DBA, 42 U.S.C. 1653(a), which authorizes the Secretary of Labor to extend compensation districts established under the LHWCA to any area in which the DBA applies. Because the Secretary never established an office for an extended DBA compensation district outside a judicial district of the United States, this portion of Section 3(b) has never had practical significance. See 20 C.F.R. 702.101, 704.101; *Pearce* v. *Director, OWCP*, 603 F.2d 763, 766 (9th Cir. 1979).

administrative and judicial procedures for resolving claims. Under Section 19 of the revised Act, Congress transferred responsibility for conducting hearings on claims from deputy commissioners to administrative law judges, although the deputy commissioners otherwise retained their investigative and administrative authority. See 33 U.S.C. 919. Under Section 21 of the revised Act, Congress provided for administrative review of initial claims determinations: Congress eliminated the provision for district court review and instituted a specialized national administrative tribunal, the Benefits Review Board (BRB), to hear appeals from such decisions. 33 U.S.C. 921(b). Congress also amended Section 21 to provide for judicial review, at the behest of any party aggrieved by an order of the BRB, by petition for review in the court of appeals for the circuit in which the employee's injury occurred. 33 U.S.C. 921(c).

2. Respondent Wanda Sue Frazier worked for petitioner American Express at the Rhein-Main Air Force Base in Germany. Her employment was covered by Section 1(a) of the DBA. Pet. App. A2. After suffering an injury in the course of her employment, respondent Frazier filed a claim for workers' compensation benefits under the LHWCA as incorporated by the DBA. *Ibid.* Petitioner AFIA/Cigna is American Express's insurer for purposes of this claim. *Ibid.* In July 1989, respondent Marilyn Felkner, Deputy Commissioner of the Eighth Compensation District of the Department of Labor, issued a compensation order awarding temporary total disability benefits as of October 13, 1976, the date of Frazier's injury, to December 3, 1980. The order awards permanent total disability benefits thereafter. *Id.* at A2.

Petitioners filed this action in district court to set aside the deputy commissioner's compensation or-

der. Pet. App. A2. Petitioners also filed an appeal with the BRB. *Id.* at A3. Respondent Felkner filed a motion to dismiss the district court action, contending that review of the compensation order lies with the Benefits Review Board under Section 21(b) of the LHWCA, as incorporated by the DBA. The district court agreed and dismissed the action, holding that it did not have jurisdiction pending resolution of petitioners' appeal to the BRB. Pet. App. C1-C2. The district court also concluded that "the proper court for an appeal from any decision of the BRB would appear to be a court of appeals, not a district court. See 33 U.S.C. 921(c); *Pearce* [v. *Director, OWCP*, 603 F.2d 769, 770 (9th Cir. 1979)]." Pet. App. C2.

3. The court of appeals affirmed the dismissal of the district court proceeding, holding that the BRB has sole jurisdiction over petitioners' challenge to the deputy commissioner's order. Pet. App. A1-A13. The court noted that, under Section 1(a) of the DBA, the compensation procedures of the LHWCA govern except insofar as they are modified by the DBA. Pet. App. A4. The court then turned to the "core issue on appeal": "whether the 1972 Amendments to section 21 of the LHWCA, providing for initial review of compensation orders to be administrative with the BRB, apply to initial review of compensation orders under the DBA." Pet. App. A7.

The court ruled that the BRB has exclusive jurisdiction over an initial appeal of a DBA compensation order. It rejected petitioner's argument that Section 3(b) of the DBA authorizes direct review in district court. Emphasizing that Section 3(b) addresses "Judicial proceedings," 42 U.S.C. 1653(b), the court held that the provision modifies only the judicial review procedures of the LHWCA. Pet. App. A8. Because review by the BRB is an administrative pro-

ceeding and not a judicial one, and because the DBA has no provision addressing administrative proceedings, the court concluded that Section 21(b) of the LHWCA, calling for administrative review by the BRB, applies to claims arising under the DBA. Pet. App. A9.

The court further held that requiring review by the BRB does not create any inconsistencies or disrupt the administration of DBA claims. Pet. App. A9. The court noted that its ruling retains parallelism between the DBA and the LHWCA, at least for the administrative stage of proceedings, and that review by the BRB does not interfere with any of the judicial review provisions already in place under the DBA. *Ibid.* Accordingly, it upheld the district court's order that that court lacked jurisdiction and that initial review of a compensation determination is before the BRB.

Although the BRB had not decided petitioners' appeal, Pet. App. A3, the court of appeals also addressed the question of which court—the district court or the court of appeals—would possess jurisdiction over a petition to review any future decision by the BRB. It concluded that Section 3(b) of the DBA requires any judicial review proceeding with respect to DBA compensation orders to be instituted in district court. Pet. App. A11-A12.

## ARGUMENT

1. Petitioners' contention, Pet. 13-17, that there is a conflict among the circuits is based on their failure to distinguish between two distinct issues: (1) whether DBA compensation determinations are subject to BRB review; and (2) in which court are BRB decisions subject to judicial review.

a. No court has accepted petitioners' contention, Pet. 18, that a party may bypass the BRB and secure direct judicial review of an administrative decision on a DBA claim. Petitioners argue (Pet. 14) that the Sixth Circuit, in *Home Indemnity Co.* v. *Stillwell*, 597 F.2d 87, cert. denied, 444 U.S. 869 (1979), "concluded that the proper method to obtain review of a compensation order is in the district court." In fact, *Home Indemnity* concluded that the proper method to review a *BRB* order is in the district court. The linchpin of the court's reasoning was that Section 3(b) is a *judicial* review provision that was unaltered by the 1972 amendments to the LHWCA. The Sixth Circuit did not suggest that the administrative review provisions of the 1972 amendments are inapplicable. 597 F.2d at 90. Indeed, the petitioner in that case had followed the administrative review provisions of the LHWCA by obtaining a Board decision before proceeding to court. Thus, there is no conflict among the circuits on the precise issue presented at this stage of the proceedings.

b. The second issue discussed in the petition is whether the court of appeals or the district court possesses jurisdiction over an appeal from a BRB decision on a Defense Base Act claim. There is a conflict among the circuits on that issue. Compare *Home Indemnity Co.* v. *Stillwell*, 597 F.2d at 88 (6th Cir.) (BRB decisions reviewable in district court), with *Pearce* v. *Director, OWCP*, 603 F.2d 763, 769-771 (9th Cir. 1979) (BRB decisions reviewable in court of appeals). But that conflict does not merit the Court's review at this time. The BRB has not yet issued a decision, and it is purely speculative whether any party to this case will ultimately deem itself sufficiently aggrieved by any such decision to seek judicial review. If a party does seek judicial review of a future BRB order, and the

case does not settle, a party to that proceeding can then seek this Court's review on the question of court jurisdiction to review BRB orders. Thus, even if the issue warranted this Court's review, petitioners seek merely an advisory opinion in the procedural posture of this case. Cf. *The Monrosa* v. *Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959) (the Court's "function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial. Resolution here of the * * * [issue in conflict among the circuits] can await a day when the issue is posed less abstractly").

2. The court of appeals is clearly correct that a party must exhaust its administrative remedy before the BRB prior to seeking judicial review. As the court explained, the DBA incorporates the LHWCA except as modified by the DBA itself. Section 21(b) of the LHWCA sets forth an administrative review procedure, mandating that decisions on claims be appealed to an administrative body, the Board. The only provision in the DBA addressing review of compensation orders is Section 3(b) of that Act, and that provision relates solely to "Judicial proceedings." 42 U.S.C. 1653(b). As the court of appeals held, there is no basis for concluding that this provision overrides the LHWCA's administrative review provisions. Thus, whatever the appropriate interpretation of the interplay between Section 3(b) and the *judicial* review provisions of the LHWCA , it is clear that Section 3(b) of the DBA does not modify the LHWCA's *administrative* review provision, Section 21(b), requiring resort to the BRB before a case is ripe for judicial review.

Congress viewed establishment of the Benefits Review Board, a specialized national administrative tribunal, as an important modification to the

LHWCA's administrative scheme, one that was in line with "the trend in better administered workmen's compensation laws." S. Rep. No. 1125, 92d Cong., 2d Sess. 15 (1972). It is unlikely that Congress intended DBA claims, which are otherwise administratively processed like other LHWCA claims, to be excluded from this significant improvement in the administrative scheme. In the absence of any textual support in the DBA for such an anomalous result, it is not surprising that the courts of appeals have agreed that Section 21(b) of the LHWCA applies to DBA claims.

3. Moreover, the relatively small number of DBA appellate proceedings counsels against review by this Court in the absence of a conflict in the circuits on the question now presented. Claims arising under the Defense Base Act represent a minute percentage of LHWCA-related claims. Of 40,650 lost-time injuries[3] reported to OWCP in fiscal year 1990 under the LHWCA and statutes that incorporate its provisions, only 801 (2%) were injuries occurring in employment covered by the DBA. Furthermore, only a small percentage of lost-time injuries reported result in claims that proceed as far as review by the BRB. For example, while 40,650 LHWCA-based injuries were reported in fiscal year 1990, in the same year approximately 800 LHWCA-based administrative decisions were appealed to the BRB.[4] Thus, assuming

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[3] A lost-time injury is a job-related injury that (1) results in an employee's loss of one or more shifts of work or (2) qualifies for a scheduled award under Sections 8(c)(1)-(20) of the LHWCA, 33 U.S.C. 908(c)(1)-(20).

[4] The number of appellate proceedings under the Nonappropriated Fund Instrumentalities Act (NFIA), 5 U.S.C. 8171-8173, which extends the LHWCA to employees of nonappropriated fund instrumentalities as described in 5 U.S.C. 2105(c), is also

that DBA cases are appealed to the BRB with the same frequency as other LHWCA cases, the jurisdictional issue presented by the petition affects less than 20 cases each year.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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quite small. Approximately 17% of LHWCA-based lost-time injuries (6,945 out of 40,650) reported to OWCP in fiscal year 1990 occurred in employment covered by the NFIA. Of these, only a small minority involve claims based on injuries or deaths occurring outside the United States, which would implicate the NFIA judicial review provision corresponding to Section 3(b) of the DBA. See 5 U.S.C. 8171(d).